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Relator adopts and incorporates the statement of facts from its opening brief.

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE VENUE IS IMPROPER IN THE CITY OF ST. LOUIS PURSUANT TO RSMO § 508.040, IN THAT NEITHER TWA NOR ITS MAINTAIN AN OFFICE OR AGENT IN THE CITY OF ST. LOUIS AND THE CAUSE OF ACTION ACCRUED IN ST. LOUIS COUNTY

Relator has established that venue is improper in the City of St. Louis pursuant to § 508.040 RSMo. Contrary to plaintiff's assertion, Relator has provided competent evidence to support a finding of improper venue. Relator provided the court with the allegations contained in its original venue motion (to which plaintiff failed to reply) along with an affidavit signed by its representative. (A13-A19). Then, at the time of filing of its Motion to Reconsider, Relator provided the trial court with a notarized copy of the same affidavit. (A54-A62). The evidence presented to the trial court establishes that plaintiff's cause of action accrued in St. Louis County and that the defendants do not have any offices or agents in the city of St. Louis. Although Relator contends that this evidence was not necessary, it is clear that Relator provided plaintiff and the trial court with competent evidence to demonstrate that venue was improper.

Instead of responding to this evidence, plaintiff can only accuse Relator of attempting to gain a "second bite at the venue apple." As alleged in Relator's Brief, however, it is clear that Respondent erred in not transferring the case to an appropriate venue, and that Relator is simply continuing in its efforts to remedy that error. It is

undisputed that Relator does not maintain offices or agents in the City of St. Louis. Notably, despite having filed four separate legal briefs with three separate courts, at no point has plaintiff presented any evidence to support her claim that venue is proper. For this contention, plaintiff relies solely on the baseless allegation contained in her petition; an allegation that has been soundly disproven. Plaintiff is careful not to represent to this Court that Relator actually has an office or agent in the City of St. Louis or that venue is, in fact, proper there. This is because plaintiff cannot provide any evidence to support her allegation and, presumably, because plaintiff is seeking to avoid a second violation of Rule 55.03, which requires an attorney certify that he or she has evidentiary support for any contention contained in a pleading. See Rule 55.03.

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE TWA AND ITS SATISFIED THEIR BURDEN OF DEMONSTRATING IMPROPER VENUE, IN THAT PLAINTIFF FAILED TO DENY OR OTHERWISE REPLY TO SUBSTANTIVE ALLEGATIONS THAT VENUE WAS IMPROPER AND ADDITIONAL PROOF BY WAY OF AFFIDAVIT WAS UNNECESSARY

Relator does not dispute plaintiff's contention that a party challenging venue bears the burden to prove that venue is improper, or that affidavits, oral testimony or deposition may be appropriate to offer in support of a venue transfer motion. What plaintiff ignores is that the Relator only bears the burden to prove venue is improper ***where proof is necessary***. State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 31 (Mo. App. 2002). In this

case, proof of venue was not necessary because plaintiff failed to reply to TWA and ITS' allegations that venue was improper, effectively conceding the issue. See State ex rel. Bierman v. Neill, 90 S.W.3d 464 (Mo. banc 2002). While plaintiff tries to distinguish it, this Court's decision in Bierman is applicable to this precise situation. Plaintiff also raised this issue in her response to Relator's Petition for Writ of Prohibition, which was previously considered by this Court. (A104-A105). Because Relator has already responded to this argument in its earlier brief, it will not reiterate its response here. (Relator's Brief at 18-20).

Even if this Court were to find that plaintiff did not waive any right to require Relator to provide evidence in support of its venue motion under Bierman, plaintiff's failure to reply should still operate as an admission against her in accordance with Rule 55.09. In response, plaintiff offers two reasons why this Court should ignore Rule 55.09: (1) plaintiff was not "required" to file a reply to defendants' motions under Rule 51.045; and (2) plaintiff was responding to a "motion" rather than a "pleading." Despite plaintiff's arguments, this Court has already decided that the general rule of pleading articulated in Rule 55.09 should apply under these circumstances.

In State ex rel. Vee-Jay Contracting Co. v. Neill, this Court expressly held that Rule 51.045 is a direct application of the rule that failing to file an answer to a pleading admits the allegations of the pleading. 89 S.W.3d 470, 472 (Mo. banc 2002) (citing Rule 55.09). While it is true that Rule 51.045 states that an opposing party "may" file a reply to a motion transfer venue, the Rule further states that, "[i]f the issue is determined in favor of the movant or if no reply is filed, a transfer of venue **shall** be ordered to a court

where venue is proper." (emphasis added). As explained by this Court in Vee-Jay, "[t]he plain and ordinary meaning of Rule 51.045 mandates a transfer of venue when no reply is filed by the opposing party to a motion to transfer venue that alleges that venue is improper." Vee-Jay, 89 S.W.3d at 472. "This [rule] is but an application of the general rule that failure to file a required answer admits the allegations of the preceding pleading." Id. (citing Rule 55.09). In other words, although Rule 51.045 allows a party the discretion to reply, the failure to do so results in transfer, effectively operating as an admission that venue is improper. It is for this reason the court in Vee-Jay recognized the relationship between Rule 51.045 and Rule 55.09.

As a supplement to plaintiff's argument Rule 55.09 should not apply because she was not required to file a reply to Relator's venue motion, she points out that, had the drafters of the Missouri Rules of Civil Procedure required responses to motions to transfer venue, the mandatory language found in the rule applicable to summary judgments, Rule 74.04, would have been included in the Rule. For the same reasoning expressed by this Court in Vee-Jay, and as discussed above, the plain language of Rule 51.045 has the same operative effect as the mandatory language found in Rule 74.04. In essence, the drafters did not need to use the word "shall" to require a party to reply to a venue challenge, because they included additional language in Rule 51.045 to give effect to any failure to reply – language that results in an admission venue is improper.

Plaintiff's attempt to distinguish a motion from a pleading is equally irrelevant to this Court's analysis here. While the plain language of Rule 55.09 may refer to pleadings, this Court has already extended the application of Rule 55.09 to venue

motions. See Vee-Jay, 89 S.W.3d at 472. As a result, the fact that a "motion" is at issue instead of a "pleading" does not prevent plaintiff's failure to reply from operating as an admission that venue is improper, as Rule 51.045 explicitly provides.

Next, although plaintiff contends a reply to Relator's venue motion was unnecessary, she alternatively argues that she did, in fact, reply to the motions filed by TWA and ITS. Notably, however, she concedes that she never actually contested TWA or ITS's assertion that venue was improper, and that her "reply" alleged only that TWA and ITS waived their right to challenge venue by filing Notices of Bankruptcy. Again, it is worth restating that, in entering its Order on the venue motions, the trial court ruled that the motions were timely filed and explicitly rejected plaintiff's only challenge to the venue transfer. (A52). In this instance, therefore, by only claiming TWA and ITS waived venue and failing to deny or even contest the factual allegations of the venue transfer motions or supporting affidavit, it cannot be said that plaintiff replied to the motions.

III. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TWA AND ITS' MOTIONS TO RECONSIDER, IN THAT THE TRIAL COURT IMPROPERLY REFUSED TO CONSIDER TWA'S SUPPLEMENTAL AFFIDAVIT.

Plaintiff argues that the trial court properly refused to consider TWA's supplemental affidavit. Although the decision to allow it to submit the notarized

affidavit was within the discretion of the trial court, Relator reiterates its position that a careful examination of the facts and circumstances described in its earlier brief demonstrates the trial court's refusal to consider the affidavit was a clear and palpable abuse of that discretion. See also, Rule 55.03(a); Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004).

As explained in greater detail in Relator's Brief, defendants TWA and ITS advised the trial court that venue was improper in the City of St. Louis in a timely manner. Relator acknowledges that a great deal of time passed between the filing of its original venue motion and its submission of the supplemental affidavit. However, the passage of time is irrelevant given that Relator was unaware that that the original affidavit had not been notarized. While plaintiff suggests counsel for Relator was aware the affidavit was not notarized at the December 8, 2003 hearing, there is no evidence in the record to support plaintiff's assertion that this issue was presented to the trial court by plaintiff in the presence of TWA's attorneys at this hearing.

Next, it is disingenuous to suggest plaintiff would have been severely prejudiced upon the court's acceptance of the supplemental affidavit. TWA's supplemental affidavit was identical to the affidavit filed in the original motion to transfer of venue except for the notarization, which did not provide any additional substantive information. Plaintiff had ample time to respond to the merits of the affidavit or perform discovery, but elected not to do so. Moreover, it is clear that venue was never proper in the City of St. Louis. Accordingly, plaintiff has never been entitled to venue there, and acceptance of the supplemental affidavit would not have deprived plaintiff of any rights to which she was

entitled. Plaintiff contends that she would be prejudiced by allowing TWA "to skirt the Supreme Court Rules" and get a second chance to defeat venue. However, it is plaintiff that is attempting to skirt both the Supreme Court Rules and Missouri statutory law regarding venue by attempting to assert her claim in an improper venue based on nothing more than a misrepresentation of fact contained in her petition.

Finally, there is evidence to support Relator's contention that it would suffer substantial hardship if it were forced to defend this action in the City of St. Louis. In State ex rel. Linthicum v. Calvin, the Honorable Justice Michael A.Wolff, examined the difference between the jury pool in the City of St. Louis and the County of St. Louis. 57 S.W.3d 855, 858-862 (Mo. banc 2001) (Wolff, J., concurring in part and dissenting in part). Justice Wolff's opinion provides sufficient evidence to support the assertion that jurors in the City of St. Louis are more favorably disposed towards injured plaintiffs' claims than are their counterparts in St. Louis County. Simply put, this "anecdotal evidence," as described by plaintiff, is sufficient to support a finding of hardship on Relator if it is forced to defend this case in an improper venue.

CONCLUSION

TWA and ITS's Motions to Transfer for Improper Venue were timely filed in response to plaintiff's Petition. It is undisputed that the underlying cause of action accrued in St. Louis County and that TWA and ITS did not have offices or agents for the transaction of their usual or customary business in the City of St. Louis. Thus, it is undisputed that venue is improper in the City of St. Louis. In denying the venue motions, the Respondent improperly ignored the effect of plaintiff's failure to reply to TWA and

ITS' allegation venue was improper. Respondent also abused its discretion in refusing to allow TWA to submit a supplemental, notarized affidavit in order to correct the inadvertent mistake of its counsel.

Because it cannot be disputed that venue is improper, any further action by the trial court is in excess of its jurisdiction. Relator respectfully requests that this Court make its preliminary writ of prohibition absolute, and enter an Order prohibiting Respondent from taking any further action other than to order transfer of venue to the Circuit Court of St. Louis County.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed and served via U.S. Mail this 19th day of November, 2004, to following counsel of record:

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

Todd C. Stanton, attorney of record for Relator, certifies pursuant to Supreme Court Rule 84.06(c) that:

1. The Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and Local Rule 360;
2. The Brief, excluding the cover page, signature block, Certificate of Service, this Certificate, and the Appendix contains 2,099 words, according to the word count total contained in the MS Word 2000 software with which it was prepared; and
3. The disk accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

_____
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